NO. 82-1775

IN THE

Supreme Court of the United States

October Term 1982

BILLY G. CHAMBERS, JR., et al.,
Petitioners,

v.

McLEAN TRUCKING COMPANY, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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McLean Trucking Company and Spector Red Ball, Inc., respectfully submit their Brief in Opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed by

Billy G. Chambers and John Angell, on behalf of themselves and the certified class which they represent.

STATEMENT OF THE CASE

The petitioners are individuals who were employed by McLean Trucking Company ("McLean") and/or Spector Red Ball, Inc., ("Spector") on an irregular casual basis between April 1, 1976 and March 31, 1979. While working for those companies, the petitioners' collective bargaining agent was the defendant, Teamsters Local Union No. 391 ("Local 391"). Local 391 has Teamsters Union geographical jurisdiction over central and eastern North Carolina. McLean and Spector maintained operations in North and South Carolina.

The relationship among the parties was governed by the provisions of the National Master Freight Agreement and the

Carolina Freight Council City Cartage Supplemental Agreement for the period April 1, 1976 to March 31, 1979. The agreement, among other things, provided a detailed, mandatory and exclusive method by which the employees, the union and the employer could pursue to a final and binding conclusion, any controversy arising under the agreement.

Within ten days of an occurrence believed to be in violation of the agreement, the aggrieved employee was required to make complaint to his union representative in order to present the matter to his employer's representative. If the union and the employer could not resolve the issue, the complaint was required to be reduced to writing, and filed for resolution before the Carolina Bi-State Grievance Committee.

If the committee was unable to reach a decision by majority vote, the case was considered deadlocked, and proceeded thence to the next step of the machinery, the Eastern Conference Joint Area Committee. Cases deadlocked at the Eastern Conference Committee proceeded to the National Committee, the final step of the grievance procedure.

Article 44 of the agreement specifically provided that a decision by a committee at one of the three levels was final and binding at that point.

The petitioners alleged that the corporate defendants did not provide them with the sum of fifty cents per hour in lieu of health and welfare benefit contributions as required by Article 53, Health and Welfare, of the same agreement. The operative language is as follows:

> "Effective May 30, 1976, the employer shall pay casual employees fifty cents (50¢) per hour, in addition to the hourly rate, for time worked, not to exceed four dollars ($4.00) per day so as to provide their own health and welfare insurance coverage. This payment shall not be subject to overtime, and shall not be required if the health and welfare contributions established by the Supplemental Agreement (weekly, etc.) have been paid on his behalf, or if health insurance is provided as interpreted by the National Committee."

The proper construction of this provision of the Collective Bargaining Agreement was the subject of much confusion and controversy among the various affected employers and the unions. As of the May 30, 1976 effective date of the aforesaid provision, no interpretation by the National Committee with regard to the provision of health insurance had been made. Accordingly, the question of entitlement to the

fifty cents payment could not be positively ascertained.

The question was brought to the attention of the Carolina Committee through the grievance machinery by virtue of separate grievances filed by Local 391 against Branch Motor Express, Pilot Freight Carriers, Inc. and Roadway Express, Inc. on June 21, 1976 on behalf of their affected casual employees, after complaints had been lodged by casuals at those companies. The Roadway case was heard first by the committee on July 8, 1976, and was deadlocked. The case proceeded to the Eastern Conference Committee, where it was again deadlocked, and thence to the National Committee. While that case was pending on the National Committee docket, that committee, charged with the responsibility so to do, on March

10, 1977 promulgated guidelines for the handling of such cases.

The guidelines provided as follows:

"1. Fifty cents (50¢) per hour, up to a maximum of ($4.00) per day Health & Welfare contribution, is to be paid each part-time/casual employee who works in a job classification covered under the Virginia or Carolina Cartage Supplements.

2. An employer must determine before employing a part-time/casual employee if that employee has current Health & Welfare coverage.

3. There shall be the following exclusion to the above guidelines: No 50¢ per hour payments in lieu of Health & Welfare coverage shall be required if the part-time/casual employee in question is covered for the time worked under a Health & Welfare plan established by the Supplemental Cartage Agreement.

4. If a part-time/casual employee has a dispute over the failure, on the part of his employer, to comply with the above, that dispute shall be subject to the grievance procedure for final determination.

5. Any dispute or grievance for Health & Welfare payments of individual part-time/casual empoloyees should be handled using the above stated guidelines. Based on the guidelines, the employer shall pay the part-time/casual employes

who filed grievances in Case No. N-3-77-E2 (Local 391 vs. Roadway).

6. Any grievance on hand/file as of March 10, 1977, should be handled using the above stated guidelines."

These guidelines were distributed to the affected employers on March 25, 1977.

The Collective Bargaining Agreement, provides that complaints must be filed within ten (10) days of the occurrence. Additionally, it had long been established by rules of the Carolina Committee that grievances must be framed with specificity as to the identity of the individuals aggrieved, dates of occurrence, and other particulars. So called "shotgun grievances", those which lack such specificity, have historically been denied redress on procedural grounds. The Carolina Committee interpreted the guidelines as eliminating those formal requirements. Essentially, those cases which had been

filed on or before March 10, 1977, even if they were so called "shotgun grievances", or if they sought relief for alleged violations of the contract which had occurred more than ten (10) days prior to their filing, were allowed to be handled by the Committee without regard to the procedural formalities normally incident to the grievance machinery. On the other hand, employees having complaints with reference to the fifty cents (50¢) per hour payment, who filed their complaints after March 10, 1977, were required to comply with the formal requisites of the grievance machinery and were subject to the ten (10) day limitation period, just as they would ordinarily and normally expect under the grievance machinery provisions of the contract.

The March 10, 1977 date was of no particular significance, in and of itself. That date was merely the one on which the National Committee met and decided upon the guidelines. Employees were already, presumably knowingly, bound by the provisions of the grievance machinery with respect to the ten (10) day limitation period. The guidelines had the effect of merely waiving those requirements for cases filed prior to the promulgation of the guidelines. After those guidelines had been promulgated, uncertainty on the part of the Carolina Committee with regard to the fifty cents (50¢) payment in lieu of health and welfare contributions was removed, and normal procedures for enforcement could continue on.

During the pendency of the Local 391 v. Roadway Express case, the other cases

which had been filed prior to March 10, 1977, came on to be considered by the Carolina Committee, after the promulgation of the National Committee guidelines. For various reasons, each of those cases was deadlocked at the Carolina Committee, and at the Eastern Conference Committee, thus bringing them to the National Committee. Those cases were then settled by the parties thereto, pursuant to the guidelines, and were removed from the National Committee agenda in September, 1977. After the resolution of those cases others concerning the fifty cents (50¢) payment were filed and came before the Carolina Committee.

Specifically, case No. 701C77, Local Union 391 v. McLean Trucking Company, filed on May 27, 1977, was heard and decided by the Committee on October 13,

1977, and case No. 729C79, Local Union 28 v. Spector Freight Systems, Inc., was heard and decided on November 8, 1977. Each was decided in accordance with the National guidelines, but with due respect to the contractual requirements of specificity as to the identity of individual claimants and with regard to the ten (10) day limitation period.

Billy G. Chambers, Jr., one of the named petitioners herein, was named as a grievant in case no. 701C77, Local Union 391 v. McLean Trucking Company. John William Angell, Jr., the other petitioner, did not appear as a named grievant in that case. Neither of the petitioners at any time prior to March 10, 1977, filed a complaint or grievance against Spector or McLean with reference to the fifty cents

(50¢) payment. Angell did not do so until March 8, 1978.

After learning of the decision rendered in case No. 701C77, Local Union 391 v. McLean Trucking Company, Mr. Angell delivered to his union business agent a grievance seeking payment of the fifty cents (50¢) in lieu of health and welfare contributions for the period from and after May 30, 1976. Being fully aware of the decisions theretofore rendered by the Carolina Committee and in light of the guidelines promulgated by the National Committee, the agent believed that processing of the grievance would be without avail. Accordingly, that grievance was not further processed.

No other grievances were filed by or on behalf of the petitioners.

SUMMARY OF REASONS FOR DENYING THE WRIT

Basic portions of the petitioners' claims were properly found by the District Court as barred by the applicable statute of limitations. The petitioners have not sought review of the holdings of the Court below with reference to application of the limitation period, and accordingly, matters so barred ought not be reviewed by this Court.

Congress and this Court have affirmatively stated that the public policy objective of fostering industrial peace is best accomplished by allowing full play to the method of settlement of disputes chosen by the parties to collective bargaining agreements. Arbitral decisions reached pursuant to such agreements ought not be disturbed by the Courts except in circumstances where the arbitration is

tainted by some impermissible influence, or is caused to fail by a union's breach of its duty of fair and adequate representation. Likewise, those who believe that a breach of the collective bargaining agreement occurred must utilize mandatory grievance-arbitration procedures provided therein unless excused by like impermissible influences and failures.

The Court below correctly and properly found that there was no breach by the union of its duty of fair and adequate representation and that there existed no other impermissible influences adversely affecting the arbitral process. Accordingly, the arbitration decision rendered ought not be inquired into, and the petitioners were not excused from utilizing the grievance arbitration procedure.

The Court below correctly limited the class to the casual employees of McLean and Spector within the geographical jurisdiction of Local 391. On the petitioners' own theory of recovery, they must first show a breach by their local union of its duty of fair and adequate representation in order to reach the question of breach of the collective bargaining agreement by the employers. None of the other five local unions in the two Carolinas were brought before the Court, as they could have been, and no breach of their duty was, or could have been, shown. Without such a breach of duty by the exclusive bargaining agent of the casual employees in the other Carolina local union jurisdictions, they could not recover. The class was properly limited to those casual employees whose exclusive bargaining agent

was before the Court.

REASONS FOR DENYING THE WRIT

1. Petitioner's Claims were Properly Found to be Barred by the Applicable Statute of Limitations.

A claim under 29 U.S.C. §185, seeking enforcement of a collective bargaining contract, where there has been a prior adverse arbitration award, is in the nature of an action to vacate an arbitration award, and the most analogous state statute of limitation applies to the claim. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). In such a case, the employee's underlying claim against the employer is based on the collective bargaining contract. However, to prevail in an action under §185, the employee must show not only that the contract was violated, but also must demonstrate that the

union breached its duty in representing the employee in the arbitration process. Hines v. Anchor Motor Freight, Inc., 424 U.S. 553 (1976). These "two elements of [the employee's] . . . hybrid action cannot be disentangled: the duty of fair representation is 'part and parcel of [the §185] claim.'" Steward, J., concurring in United Parcel Service, Inc. v. Mitchell, 451 U.S. at 69. Accordingly, both the claim against the employer for breach of contract and the claim against the union for breach of duty of fair representation, are subject to the same statute of limitations. Sine v. Teamsters Local 992, 644 F.2d 997 (4th Cir. 1981).

The state statute of limitations for vacating an arbitration award would apply in this instance. The District Court ap-

plied the North Carolina 90 day limitation prescribed by N.C.G.S. §1-567.13(b).

The petitioners have not sought review of these holdings, and under this Court's holding in United Parcel Service, Inc. v. Mitchell, supra, such would appear completely futile. Accordingly, the petitioners' positions with reference to any grievance filed by the petitioners ought not be entertained.

2. The Local Union Was Properly Found Not To Have Breached Its Duty of Fair And Adequate Representation

A Local 391 business agent filed the grievance of March 27, 1977, in which petitioner Chambers was a named party, prepared and submitted a brief, and argued the merits before the Carolina Committee, even though he knew it was a hopeless case in light of the National Committee guide

lines and the 10 day time limit on grievances. Petitioners have not pointed to any deficiency in the business agent's representation of Chambers and the other complainants in that grievance proceeding.

On March 8, 1978, petitioner Angell filed grievances against both Spector and McLean, purportedly on behalf of all casual employees, seeking the 50¢ per hour benefit. The Union agent felt that the grievance against McLean was barred by the unsuccessful May 27, 1977 grievance, and he took no action with respect to it. The grievance against Spector was settled on April 4, 1978, by the company agreeing to pay any benefits due for the 10 days preceding the date on which the grievance was received. None was due.

With respect to the Angell grievance of March 8, 1978, against McLean, there was no failure of fair representation, because there is no duty on the part of the union to accept subsequent grievances filed by other employees when the same claim has been previously decided adversely by the arbitrator or grievance committee. Smith v. Hussman Refrigerator Co., 442 F. Supp. 1144 (E.D. Mo. 1977). There is no failure of fair representation in refusing to process such a grievance. Patterson v. International Brotherhood of Teamsters, 405 F. Supp. 980, 987 (S.D. Ill. 1976). Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971).

With respect to the grievance against Spector, there could be no valid claim of breach of duty of fair representation, because the union representative settled

this grievance by obtaining the maximum recovery permissible under the National Committee guidelines. The union representative has the right to exercise discretion and settle a grievance without going to arbitration. Vaca v. Sipes, 386 U.S. 171 (1967); Wyatt v. Interstate and Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980).

Finally, it must be noted that the union is under no duty to promote industrial warfare by seeking out employee grievances. The union's duty of representation normally arises in connection with employee recourse to grievance machinery "during the life of a contract when individual employees claim wrongful discharge or other improper treatment at the hands of the employer." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564

(1976). It was clearly established in the Court below that it was a long standing procedure for grievances to be initiated under the contract in question by the employee's filing a complaint with his shop steward. It is the aggrieved employee's duty to initiate the grievance process, and in the absence of a complaint by an individual worker, the union ordinarily has no duty to take action.

Petitioners have not called to the Court's attention any case in which it was held that the duty of fair representation can be breached by the union's failure to ferret out a grievance and bring it to arbitration, when no employee has come forward to file a complaint. The union's duty of representation arises when the individual employee comes forward with a complaint of contract violation. Hines v.

Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976).

3. The District Court Properly Found That No Undue Influence Infected the Arbitral Process.

Petitioners sole remaining criticism of the union's representation in actual grievance proceedings is the introduction of a telegram from a member of the National Committee advising of the National Committee's intention that March 10, 1977 be considered a date as of which grievances already filed and on hand would be redressed irrespective of procedural infirmities.

The exercise of undue influence on an arbitrator in an ordinary arbitration subject to general judicial review, usually consists of having a separate conference with, or otherwise making improper ex

parte approaches to, the arbitrator. Petitioners complaint here concerns the introduction of evidence which they believe was not admissible. This does not amount to the exercise of undue influence. 6 C.J.S., Arbitration, §152c.

Collective bargaining contract arbitrations, of course, are subject only to a narrowly restricted judicial review. The courts are precluded from assessing the merits of the arbitration award. United Steel Workers v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 596 (1960). This Court has held that:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to an arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator."

United Steel Workers v. American Manufacturing Co., 363 U.S. 564, 568 (1960).

Thus, labor arbitration awards cannot be vacated either for errors of fact or errors of law, Washington-Baltimore Newspaper Guild Local 35 v. Washington Post Co., 442 F.2d 1234 (1971), or for misconstruction of the contract, Kroger Company v. International Brotherhood of Teamsters, 380 F.2d 728 (6th Cir. 1967). It has been specifically held, that the question of whether a grievance was timely filed, was for the arbitrator and is not for the court. Tobacco Workers' International Union Local 317 v. Lorillard Corp., 448 F.2d 949 (4th Cir. 1971). It would be completely at odds with the established principle of finality of labor arbitration, for the court to accept petitioners' invitation to speculate as to

what degree, if any, the telegram influenced the arbitral committee.

4. The District Court Was Correct in Limiting the Class to Casuals Within the Jurisdiction of Local 391.

As opposed to the class proposed by the petitioners, the District Court limited the class to casual employees of McLean and Spector within the geographic jurisdiction of Local 391. In order to appreciate the correctness of this limitation, it is only necessary to understand the basic theory upon which the petitioners themselves hope for recovery. In an action of this nature, under 29 U.S.C. §185, where there exists a collective bargaining agreement with a final and binding arbitration procedure, the petitioners must show that their exclusive collective bargaining agent unfairly represented them, and allowed a breach of

the collective bargaining agreement by their employer to go unredressed. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335, (1964).

Examining the petitioners own theory, it is clear that to recover, the petitioners must show unfair representation by the exclusive bargaining agent charged with that duty. As pointed out above, the only party to this action charged with such a duty is Local 391. As found by the Court below, and as discussed at length above, Local Union No. 391 did not breach its duty of fair representation. There has been presented no evidence on which to base any conclusion that the other five local unions in the two Carolinas in any way breached that duty. Accordingly,

since the petitioners cannot cross that first hurdle with reference to those local unions, and those locals were never made parties to this action, they cannot reach the question of breach by the defendant employers with reference to casuals within the jurisdiction of the other five local unions. No proper person to complain of the actions or inactions of the other five local unions has ever been party to this action.

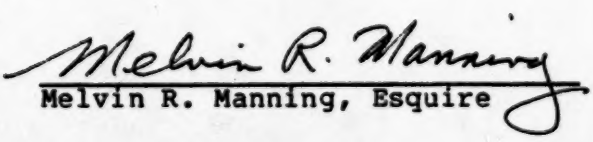
The petitioners, represented by Local 391 can themselves represent only similarly situated individuals, that is to say, casuals employed by McLean and Spector, and also represented by Local 391. There has been no showing that Local 391 ever represented the interests of casuals, or any other employee, under the jurisdiction of any of the other Carolina local unions.

There exists no real nexus, no true relationship, between casuals in other locals and the casuals in the Local 391 area because Local 391 was not their representative. Accordingly, petitioners' arguments to enlarge and extend the class properly failed in the Court below.

CONCLUSION

On the basis of all the foregoing statement of facts and arguments of law, and the fact that petitioners have advanced no reason for granting review under Rule 17 of the Rules of the United States Supreme Court, the respondents, McLean Trucking Company and Spector Red Ball, Inc., respectfully ask that the petition for Writ of Certiorari be denied.

Respectfully submitted,



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I, Melvin R. Manning, an attorney in the office of McCaul, Grigsby, Pearsall, Manning & Davis, attorney of record for respondents, McLean Trucking Company and Spector Red Ball, Inc., and a member of the Bar of this Court, depose and say that on the 31st day of May, 1983, I served three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by causing the same to be deposited in the United States Post Office, postage prepaid to:

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Melvin R. Manning

Subscribed and sworn to
before me, this the 31st
day of May, 1983.

Notary Public

My Commission expires: 9-16-84